No. 363

In the Supreme Court of the United States

OCTOBER TERM, 1963

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, ET AL., PETITIONERS

v.

NATIONAL MEDIATION BOARD AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL MEDIATION BOARD AND ITS MEMBERS IN OPPOSITION

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OPINIONS BELOW

The findings of fact and conclusions of law of the district court (Pet. App. 9a-35a) are unreported. The opinion of the court of appeals (Pet. App. 36a-51a), is not yet reported.

JURISDICTION

The decision of the court of appeals was rendered on June 28, 1968. The petition for a writ of certiorari

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was filed on August 2, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that, in the circumstances of this case, the district court had no authority to enjoin the National Mediation Board from conducting representation elections.

STATEMENT

This case involves two separate representation disputes between an incumbent union, the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes ("Clerks' Union"), and a challenging union, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Teamsters' Union"). The employees involved are clerical, office and related employees of Pan American World Airways, Incorporated and Braniff International Airways, Incorporated. In two actions filed by the Clerks' Union, the district court granted preliminary injunctions enjoining the National Mediation Board from holding representation elections.

The court of appeals reversed, holding that "the complaint[s] should have been dismissed" (Pet. App. 38a).

A. *The Pan American Dispute*

The Clerks' Union has represented the Pan American employees involved here since 1946 (J.A. 6).[1] On

[1] "J.A." references are to the joint appendix in the court of appeals.

August 6, 1965, the Board received an application from the Teamsters Union alleging the existence of a representation dispute among these employees (J.A. 63, 101). After lengthy hearings and investigations to determine exactly which employees would be covered by subsequent proceedings, the Board, on June 30, 1966, ordered an election (J.A. 64, 66, 92, 98, 101, 102, 105, 106, 109). The Board honored the request of the Clerks' Union that its name be omitted from the ballot (J.A. 66–67, 118).

During the mail balloting, certain forged letters were sent urging the employees to write in the name of the Clerks' Union (J.A. 67).[2] Consequently, the Board impounded the ballots on September 7, 1966 (J.A. 68, 119), and sent the information it had to the Department of Justice and the Post Office Department for investigation and consideration of criminal action (J.A. 68).

After being informed that there would be no prejudice to the possibility of criminal action if the Board continued its investigation (J.A. 69, 120), the Board ordered a second election (J.A. 122). On November 10, 1966, the Clerks' Union brought an action to enjoin this second election on the ground that the prejudicial effects of the fraudulent first election had not been dispelled. The district court dismissed the case for lack of jurisdiction over the subject-matter, and the court of appeals affirmed. 374 F. 2d 269 (C.A.D.C.).

[2] The Clerks' Union believed that it would continue as the representative if the voting did not produce valid ballots from more than one-half of the eligible employees. Each valid write-in vote for the Clerks' Union undermined this position.

The second election ballot count began on December 27, 1966 (J.A. 72). The Clerks' Union raised numerous objections to rulings made at the counting (Pet. 24–28). The Teamsters' Union received eighty-seven percent of the valid ballots cast, but if some of the Clerks' Union's objections were allowed the number of persons who cast valid votes would be less than a majority of the eligible employees (J.A. 143–146).[3]

After considering these objections (J.A. 73), the Board on September 12, 1967, held that a third election was necessary to ascertain the clear choice of the employees. It determined that the employees' true choice could be most accurately determined if, unlike the ballot used in the first two elections, this ballot contained the names of both the Clerks' Union and the Teamsters' Union. The Board ruled that if the Clerks' Union did not wish its name on the ballot, it was to disclaim any interest in continuing to represent the employees. In denying the Clerks' Union's petition for reconsideration, the Board further amplified the reasons for its decision (J.A. 26–30).

The Clerks' Union filed this suit seeking: (1) a declaratory judgment that the Board must dismiss the Teamsters' Union's application on the basis of the Clerks' Union's challenges to the votes cast in the

[3] There were 6936 eligible voters. The Teamsters' Union received 3091 votes, the Transport Workers' Union 284, the Clerks' Union 137, and others 5. Thus, if the 137 write-in votes for the Clerks' Union were declared invalid, less than one-half of the eligible voters would have cast valid ballots for union representation.

second election;[4] (2) a declaratory judgment that no dispute existed due to the lack of proper authorization cards; (3) declaratory and injunctive relief prohibiting the Board from requiring the Clerks' Union's name to be placed on the ballot. The Clerks' Union filed a similar suit in the Braniff dispute.

B. *The Braniff Dispute*

Similar questions are presented by the dispute among the employees of Braniff International Airways. The group of employees involved is similar to that in the Pan American dispute. Here also the incumbent union is the Clerks' Union. The Teamsters' Union applied to the Board on May 4, 1967, alleging a representation dispute among certain Braniff employees (J.A. 240). The Clerks' Union again requested that its name be left off the ballot but asserted that it was not disclaiming its interest in continuing to represent the employees involved (J.A. 241). After notice and hearing (J.A. 244), the Board decided that the Clerks' Union must either be on the ballot or disclaim any interest in representing the employees (J.A. 30, 244).

ARGUMENT

In *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, this Court held that the district courts have no jurisdiction to review Board certifications in representation proceedings. That case involved solely

[4] This request for relief was in accordance with the Clerks' Union's view (J.A. 8) that it would remain certified if less than fifty percent of the eligible voters cast valid ballots.

a question of statutory construction, and the Court interpreted the Act as prohibiting review, stating (320 U.S. at 305):

> [T]he intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law.

This Court recently reaffirmed this principle in a case similar to the instant one. *Railway Clerks* v. *Employees Assn.*, 380 U.S. 650. The lower courts had enjoined the Board from holding an election without a "no union" space on the ballot, but this Court reversed on the authority of *Switchmen's Union*, stating (id. at 671):

> Unable to point to any specific requirement of a "no union" ballot in the Act, United and the Association are left to arguing in terms of policy and broad generalities as to what the Railway Labor Act should provide. The very nature of the argument indicates that the Board's choice of its proposed ballot is not subject to judicial review, for it was to avoid the haggling and delays of litigation that such questions were left to the Board. These are matters for Congress and the Board rather than the courts. Here the Board—a creature of Congress—has been, as we have said, careful to provide fair, yet effective procedures and we feel certain that it will continue to do so. If its decision on the ballot is not acceptable, the place to go is to Congress, not to us.

Although two exceptions to the nonreviewability of Board rulings in representation cases have been recognized, neither of them applies to this case. The exceptions are both narrow: (1) where the Board has acted beyond its "jurisdiction" and in "excess of its delegated powers and contrary to a specific prohibition in the Act" (see *Leedom* v. *Kyne*, 358 U.S. 184, 188; *Railway Clerks, supra*, 380 U.S. at 659–660), or (2) where the Board has failed to perform a duty or function which the Act imposes upon it (see *Railway Clerks, supra*, at 661). The Board has not exceeded its delegated powers, acted contrary to a specific statutory provision, or failed to perform a statutory duty by setting aside an election that it believes was unfairly conducted and ordering another one, and by requiring both unions to appear on the ballot.

The Clerks' Union argues (Pet. 25) that there is no "statutory authority to require the Clerks name to go on the ballot or to abandon representation rights." The Act, however, "empowers the Board to establish the rules governing elections," and "leaves the details to the broad discretion of the Board" (*Railway Clerks, supra*, 380 U.S. 668–669). The Board did not abuse its broad discretion in concluding that, in order to avoid the uncertainties that had characterized the two prior elections, both unions should have their names on the ballot so that the employees would have no difficulty in making an informed choice in voting. The Clerks' Union's theory that it can remain off the ballot but continue to represent the em-

ployees if less than one-half of them cast valid ballots, is contrary to the Board's practice under which an employee votes for no union by refraining from voting. See *Railway Clerks, supra,* 380 U.S. at 668–671. Under the Clerks' Union's theory, however, the failure to cast a valid ballot is not a vote for no representation but a vote for continued representation by that union. Thus, the absence of the Clerks' Union from the ballot in the second election meant that, as a practical matter, the Pan American employees were effectively denied their right to vote for no representation; such an election did not satisfy the statutory standards.

The Board similarly acted within its authority in ordering a third Pan American election. In the second election the Teamsters Union received 3091 votes out of a possible 6936, the Transport Workers Union received 284 write-in votes, the Clerks' Union received 137, and others received 5 (J.A. 143–146). Thus, 3517 employees, more than one-half of those eligible to vote, cast ballots in favor of union representation which were valid on their face. In view of the closeness of the results and the possibility that some of the employees might have been confused by the form of the ballot or by the earlier fraud, the Board was warranted in ordering a third election to attempt to determine more accurately the true desire of the employees. As the court below noted, "The Board can hardly be faulted for deciding to try again, particularly when the results were so close" (Pet. App. 43a). Moreover, since the results of the second Pan American election indicated that a majority of the

employees desired union representation, dismissal of the Teamsters' Union application would have been improper, because it would have constituted a determination that the employees did not want any union to represent them.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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